No. 78-1452

In the Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

MARK L. EVANS
General Counsel

FREDERICK W. READ, III
Associate General Counsel

JOHN J. McCARTHY, JR.
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 590 F. 2d 1180. The opinion of the Interstate Commerce Commission (Pet. App. 47a-63a) is reported at 353 I.C.C. 143. The opinion of the Commission on reconsideration (Pet. App. 15a-46a) is reported at 353 I.C.C. 536.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1978. The petition for a writ of certiorari was filed on March 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

QUESTION PRESENTED

Whether the court of appeals applied the proper standard of judicial review in affirming the decision of the Interstate Commerce Commission as "neither arbitrary nor capricious."

STATEMENT

49 U.S.C. 10730 (1978) (formerly Section 20(11) of the Interstate Commerce Act) provides a limited exception to the general statutory and common law rule that a common carrier may not limit or exempt itself from liability to shippers for loss or damage to property transported. Under that section, the carrier may offer reduced rates for the transportation of property where the carrier's liability is limited to a specific value. These are referred to as "released rates" because the shipper, in effect, releases the carrier from liability in excess of the stated amount. Released rates must be expressly authorized by order of the Interstate Commerce Commission.

In 1952 certain motor carriers and their representatives filed an application with the Commission for approval of released rates they wished to offer on an extensive list of commodities (mostly drugs, chemicals, and toilet preparations) (Pet. App. 16a). The limitation on liability was expressed in the application as follows (Pet. App. 43a):

> The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding 50 cents per pound for each article.

The Commission approved the application (Pet. App. 32a-45a) and incorporated the limitation "50 cents per pound for each article" in its order.

The agency proceeding at issue here concerned the proper interpretation of the word "article" in that limitation. Its meaning becomes significant in computing a carrier's liability for *partial* loss or damage to a shipment. As explained in detail in the opinion of the court of appeals (Pet. App. 4a-5a), the amount of the maximum liability varies depending on whether "article" is interpreted as each different commodity shipped (*i.e.*, the entire shipment of the particular commodity), the shipping container containing the lost or damaged portion of the commodity shipped (such as a carton), or the smallest identifiable unit of the lost or damaged commodity shipped (such as a bottle).

The Drug and Toilet Preparation Traffic Conference, a shipper group, petitioned the Commission for a declaratory order interpreting the critical phrase. Following extensive proceedings, the Commission found that the term "article" means "each commodity in a shipment" in the context of the released rates in question (Pet. App. 31a). Thus it concluded that a carrier's maximum liability under the tariff in the case of partial loss or damage would be 50 cents times the number of pounds of the entire shipment of the particular commodity, even if less than the entire shipment was lost or damaged. As the Commission noted, however (Pet. App. 31a), in no case would the carrier's liability be "more than the loss or damage actually sustained."

The court of appeals affirmed (Pet. App. 1a-13a). The court noted that the tariff provision at issue was "apparently unique" (Pet. App. 4a) and concluded that there was "no basis on which to disturb the Commission's decision" (Pet. App. 13a). The court rejected petitioners' "principal contention" that established legal doctrine requires that a carrier's liability

for partial loss or damage under a released rate provision be determined by reference to the smallest unit actually damaged and not the whole shipment (Pet. App. 8a, 13a). The court held that the Commission acted lawfully in construing the ambiguous provision against the carriers that drafted it (Pet. App. 10a-11a) and noted that the result was consistent with the agency's past approval of other released value provisions (Pet. App. 11a). The court also observed that "nothing precludes the carriers from seeking modification of the released value provision or an increase of the rates under the existing provision, to reflect the additional costs imposed on the carriers by the Commission's decision" (Pet. App. 12a).

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted.

1. The court of appeals affirmed the Commission's decision as "neither arbitrary nor capricious" (Pet. App. 2a). Although petitioners do not challenge the appropriateness of the "arbitrary or capricious" test, which is mandated by the Administrative Procedure Act (5 U.S.C. 706(2)(A)), they nonetheless argue that the court applied an "erroneous standard of review" (Pet. 10). Specifically, they argue that although the court expressly relied on the arbitrary and capricious standard, its further statement that "we cannot say the ICC's action here lacked *rational basis*" (Pet. App. 6a; emphasis added) shows that the court employed a test that was unduly deferential to the agency and properly applicable only to review of rulemaking (Pet. 8). That contention is without merit.

First, this Court has defined the arbitrary and capricious standard in terms of whether the agency's action has a rational basis. In *FCC* v. *National Citizens Comm. For Broadcasting*, 436 U.S. 775, 803 (1978), it stated that agency actions "may be invalidated by a reviewing court under the 'arbitrary and capricious' standard if they are not rational and based on consideration of the relevant factors," and cited for that proposition *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 413-416 (1971), which, like this case, did not involve rulemaking.

Moreover, the court of appeals' approach is consistent with the established principle, noted by the court (Pet. App. 6a), that agency decisions merit particular judicial deference where, as here, they involve an agency's interpretation or clarification of its own order. See, *e.g.*, *Chesapeake & Ohio Ry.* v. *United States*, 571 F. 2d 1190, 1194 (D.C. Cir. 1977). The declaratory order at issue in the instant case amounts to a clarification of the agency's order approving the released rates. That prior order, like the tariff itself, contained the disputed word "article." The order challenged by petitioners here simply clarified what the agency had approved when it authorized use of the released rates; it was thus entitled to special deference. The Commission's determination also merited particular judicial deference because it involved the interpretation of a tariff, an area in which the agency possesses

special expertise. *Indiana Harbor Belt R.R.* v. *United States*, 510 F. 2d 644, 649-650 (7th Cir.), cert. denied, 422 U.S. 1042 (1975).[1]

Finally, whatever formulation of the arbitrary and capricious standard the court of appeals articulated, it correctly upheld the Commission's decision, which simply cannot be characterized as arbitrary, capricious or irrational. Contrary to petitioners' suggestion (Pet. 4-6), there is nothing arbitrary or irrational in the conclusion that carriers intended in the tariff to compute the limit of their liability on the basis of the weight of the entire shipment of a particular commodity. Such a construction is analogous to a fixed monetary ceiling on the carrier's liability to each shipper or passenger (see, *e.g.*, Article 22 of the Warsaw Convention, 49 Stat. 3019), and it serves the principal purpose of liability-limiting provisions of providing carriers with some measure of certainty about the extent of their maximum liability per shipment. Indeed, as the court noted (Pet. App. 11a n.20), some carriers had given the provision just that construction. Moreover, petitioners do not deny that there is ambiguity in the term "article" that the carriers

[1]Petitioners contend (Pet. 8-9) that the Commission's interpretation of the measure of damages provision in the tariff should be given less deference because the courts have exclusive jurisdiction to adjudicate claims against motor carriers for damages to goods shipped. Whatever quantum of deference is appropriate in the case of ordinary tariffs, petitioners' argument is inapposite here. Unlike other types of tariffs, released rates cannot go into effect unless they have been expressly authorized by the Commission. Since the tariff at issue was effective only by virtue of having been approved by the Commission, the agency was uniquely qualified to explain what disputed terms in the tariff meant.

drafted and filed, and, as the court of appeals pointed out, carriers are free to seek modification of the tariff provision or an increase in their released rates.

2. The cases relied on by petitioners are inapposite. *Western Transit Co.* v. *Leslie & Co.*, 242 U.S. 448 (1917), did not, as the Commission and court of appeals noted (Pet. App. 9a, 26a-27a), involve a limitation provision containing any ambigious term about the measure of liability; it simply provided that the carrier's liability for lost or damaged commodities was to be measured on the basis of a "value not to exceed $100 per ton."

Petitioners also rely on *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), and *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), for their contention that the Commission's interpretations of tariffs are entitled to less deference than agency rulemaking. Those cases, however, involved agency interpretations of statutes concerning which the agency had no rulemaking authority (compare *General Electric*, 429 U.S. at 141; with *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978)) and have no application here, where the Commission's order interprets not a statute but an arcane released rate provision and the agency's prior order authorizing its use—matters on which the Commission has unique experitse. In any event, the Commission's order here was sufficiently reasonable that it should be sustained even if some lesser degree of deference were appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MARK L. EVANS
General Counsel

FREDERICK W. READ, III
Associate General Counsel

JOHN J. MCCARTHY, JR.
Attorney
Interstate Commerce Commission

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